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Issue Date: 30 September 2003

CASE NO. 2003-LHC-00224

OWCP NO. 15-45680

In the Matter of:

DARIN SCHNEIDER,
Claimant,

vs.

TRITON MARINE CONSTRUCTION,
Employer,

and

FRANK GATES ACCLAIM,
Carrier.

Appearances:

Jay Lawrence Friedheim. Esq.
For Claimant

Wesley M. Fujimoto, Esq.
For Employer/Carrier

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Darin Schneider ("Claimant") brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq.* against Triton Marine Construction ("Triton" or "Employer") and its carrier. A formal hearing was held in Honolulu, Hawaii on March 12, 2003, at which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits ("ALJX") 1-3, Claimant's Exhibits ("CX") 1-7, and Employer's Exhibits ("RX") 1-10. Transcript ("Tr") at 9-11.

On May 22, 2003, the parties submitted their Post-Trial Briefs. These are hereby admitted as ALJX 4 and 5.[1]

Stipulations:

The parties agreed to the following stipulations:

(1) On November 20, 2001, Claimant suffered an unscheduled injury arising out of and in the course of his employment.

(2) The place of injury was Pearl Harbor Dry Dock.

(3) Claimant became aware that the disability was work-related on November 20th, 2001 and disability commenced on November 28th, 2001.

(4) The parties are subject to the Act.

(5) The claim was timely noticed and timely filed.

(6) Claimant is entitled to compensation and medical benefits, and Employer is providing compensation and medical benefits at this time.

(7) Employer has paid temporary total disability starting on November 29th, 2001, and will continue to pay temporary total disability.

(8) Claimant has not reached maximum medical improvement and Claimant has no outstanding medical bills.

(9) Claimant is not now working, but he is currently participating in vocational rehabilitation.

(10) Claimant is not capable of any work at this time.

[1]ALJX 4 is Claimant's Post-Hearing Brief, ALJX 5 is Triton's.

Issues in Dispute:

1. What is Claimant's average weekly wage?

2. If Claimant prevails, is Employer responsible for payment of Section 14(e) penalties?

3. Is Claimant entitled to attorney's fees and costs?

SUMMARY OF DECISION

Claimant's average weekly wage at the time of injury was $1,319.92, giving Claimant a compensation rate of $879.95. Employer is not subject to Section 14(e) penalties. Employer will be subject to the payment of appropriate and reasonable attorney's fees and costs to Claimant's counsel.

SUMMARY OF EVIDENCE

Claimant Darin Schneider testified at the hearing on March 12, 2003. For approximately four years, Claimant worked for All Pool and Spa, Inc. ("All Pool"), a company that builds residential swimming pools. Tr 21. During the period between November 2000 and early August 2001, Claimant worked continuously. Tr 91-92. During his initial period of employment at All Pool, Claimant was paid fourteen dollars an hour. Tr 21. After approximately two and a half years, he received a raise and was making fifteen dollars an hour. Tr 22. While at All Pool, Claimant primarily installed or repaired the plumbing in residential swimming pools. Tr 71-74. Claimant's duties included laying the rough plumbing and setting up the equipment for new pools. Tr 72-73. Claimant also performed repairs on residential pools, such as replacing broken plumbing or broken pumps. Tr 84-84.

In early August 2001, Claimant left his employment at All Pool and began working at Triton as a laborer. Tr 92, RX 1.[2] Claimant was paid $22.10 per hour. Tr 58. In addition to his hourly wage, Claimant received a fringe or "prevailing wage" payment of $10.39 per hour. Tr 24, CX 7. Combined, Claimant's hourly rate and prevailing wage payment totaled $32.49 per hour. RX 1.

Claimant testified that his work at Triton was "dramatically different" from his work at All Pool. Tr 33. While at Triton, Claimant worked on a project renovating a dry dock. Tr 25. His duties included injecting epoxy to stop flooding, and saw-cutting. Tr 26. Claimant testified that saw-cutting required use of a target saw to cut out sections of concrete in the dock. Tr 79. Claimant's work at Triton also required him to use a new type of epoxy, one different from what he had used at All Pool. Tr 66.

In order to perform the duties required of his position at Triton, Claimant's supervisor provided Claimant with a list of new tools needed for Claimant's job. Tr 25. Because Claimant

[2] The parties did not specify a job title in their Closing Brief. Therefore, I have used the title "laborer" as indicated in the LS-202 form filed by Employer. RX 1.

did not possess the needed tools, he purchased them. Tr 25-26, 66. Claimant also was required to get several physical and respiratory examinations for the Triton job. Tr 35. Additionally, Claimant was required to obtain certification to operate man-lifts and snorkel lifts. Tr 77.

On November 20, 2001, Claimant injured his back while helping a coworker move a block of concrete. Tr 37-39. Although Claimant attempted to return to work, his pain was too severe. Tr 42-43. On March 4, 2002, an x-ray of Claimant's spine showed "moderate left paracentral herniation of the nucleus pulposis of the L5 S1 disc with slight compression of the left S-1 nerve root." CX 1.

On May 3, 2002, orthopedic surgeon Terry G. Smith, M.D. recommended an MRI. Tr 44. Dr. Smith confirmed a diagnosis of disc herniation at L5-S1, without significant improvement over a six-month period. CX 3. Dr. Smith recommended "med microdiskectomy of left L5-S1." A few weeks later, Claimant went into surgery. Tr 44. Claimant has not returned to work and is currently undergoing vocational rehabilitation. Tr 44.

Claimant testified that his position at Triton was permanent. Tr 33. It was Claimant's understanding that, had he not been injured, he would have continued to work forty hours a week at Triton indefinitely. Tr 61.

ANALYSIS

Average Weekly Wage

The parties dispute whether Section 10(a) or (c) is the proper section to apply in determining Claimant's average weekly wage. Claimant contends that his average weekly wage must be determined pursuant to the provisions of Section 10(c) because his actual earnings for the preceding year do not realistically reflect his wage earning capacity at the time of his injury. In this regard, Claimant argues that his compensation rate should be calculated with reference only to his earnings during the time he was employed at Triton and should not include his earnings while at All Pool. Because his position at Triton was "remarkably different" than his previous position as a plumber with All Pool, Claimant characterizes the switch as a "career change." Since he would have continued working as a laborer with Triton, Claimant urges that a fair determination of his earning capacity must take into account only those wages earned while at Triton.

In contrast, Employer asserts that Claimant's average weekly wage should be calculated under Section 10(a) because Claimant's work while at Triton and at All Pool was, in essence, "the same or substantially the same employment." Thus, Claimant's wages at All Pool must be considered in the calculation. Even if Section 10(c) is applied, however, Employer contends that the average weekly wage calculation still must be based on Claimant's actual earnings at both Triton and All Pool. Employer argues that *all* sources of income in the year preceding the injury must be considered under Section 10(c).

Section 10 of the Act provides for three methods for determining the appropriate average weekly wage of an injured worker. These methods are set forth in subsections 10(a), 10(b), and

10(c). That figure is then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods establish a claimant's earning capacity at the time of injury. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies when an injured employee worked in the employment in which he was working at the time of the injury, whether for the same or another employer, for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Section 10(b) applies when the injured worker was not employed the whole of the year immediately preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When Section 10(a) or 10(b) "cannot reasonably and fairly be applied," Section 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). Section 10(c) does not prescribe a fixed formula but requires the judge to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 901(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).

After considering Claimant's circumstances, I find that Section 10(a) and Section 10(b) are inapplicable. Therefore, Claimant's average weekly wage must be calculated under Section 10(c).

In order to apply Section 10(a), an employee must have been working in the "same employment" for "substantially the whole of the year." In the instant case, Claimant worked for two different employers during the year preceding his injury. However, a "substantial part of the year may be composed of work for two different employers" when the work performed at both jobs is "the same or substantially the same." *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd and remanded on other grounds*, 640 F.2d 769 (1981). For Section 10(a) to be applicable then, Claimant's work at All Pool and at Triton must be "the same."

Employment is the "same" when two or more jobs require comparable skill levels, experience, and compensation rates. *Mulcare v. E.C. Ernst Inc.*, 18 BRBS 158, 159-60 (1986). Applying this standard, Claimant's employment while at Triton and All Pool clearly was not "the same." First, it is undisputed that the compensation rate of each position was dramatically different. Claimant made $15.00 an hour at All Pool after working in that employment for four years. In contrast, while at Triton, Claimant made $32.49 an hour, nearly double that amount. This disparity in pay reflected a disparity in skill level and responsibility between the two positions. At All Pool, Claimant repaired pools. At Triton, Claimant worked on a dry dock, saw-cutting and injecting epoxy. The latter was a far more demanding position, requiring several types of certification and special training. Employer's assertion that any difference in the two jobs was merely due to the size of the two operations is unpersuasive. A difference in the size of an operation may well have an effect on the level of skill demanded by the operation. By analogy, building a skyscraper clearly requires substantially different skills than does building a backyard shed. Likewise, repairing a dry dock requires different skills than does plumbing a

pool. Because Claimant's work at All Pool and at Triton was not "the same or substantially the same," I find Section 10(a) inapplicable.

I further find that Section 10(b) cannot be reasonably and fairly applied as the record does not contain any evidence regarding earnings of an employee in a situation similar to Claimant. Accordingly, Section 10(b) is not applicable.

Since neither Section 10(a) nor 10(b) can be reasonably or fairly applied in this case, I must refer to Section 10(c). Under Section 10(c), actual wages earned by the claimant are not controlling. *Gunther v. United States Employees' Compensation Commission*, 41 F.2d 151 (9th Cir. 1930). Rather, Section 10(c) should be applied so as to carry out its purpose, which is to insure that compensation awards accurately reflect a claimant's earning capacity. *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980). Because a disability affects future, not past, employment, Section 10(c), like the Act as a whole, "focuses on *future* earning capacity rather than on some past period of employment." *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1989 (9th Cir. 1983).

Employer argues that, under Section 10(c), Claimant's average weekly wage must be based on actual earnings from both Triton and All Pool. In support of this position, Employer cites several cases in which earnings from two jobs were included in the computation of a claimant's average weekly wage. *Liberty Mutual Insurance Co. v. Britton*, 233 F.2d 699, 701-702 (D.C. Cir. 1956); *Cernousak v. Brawell Shipyards, Inc.*, 19 BRBS 796, 604 (1987); *Eggebrecht v. Leicht Material Handling Co.*, 16 BRBS 191, 195-6 (1984).

These cases are inapposite. In each, the claimant was injured at one employment, but concurrently worked at another, part-time employment. Thus, in order to accurately reflect the claimants' earning capacity *at the time of injury*, both jobs had to be taken into account. In the present case, Claimant's jobs were not concurrent, but rather consecutive. Concurrent employment is an entirely different circumstance than is consecutive employment and the Board has distinguished *Liberty* on exactly this ground. *Hilyer v. Morrison-Knudsen Construction Company*, 6 BRBS 754, 757 (1977). In *Hilyer*, the Board clarified that *Liberty* does not require the average weekly wage to be based on all earnings for the year prior to injury, even where such earnings are from consecutive jobs. *Id.* The Board reasoned that compensation should not be based "on prior jobs that do not completely reflect [a claimant's] wage earning capacity at the time of injury." *Id.*

Contrary to Employer's assertion, an administrative law judge is not bound to consider wages earned in an earlier employment when determining average weekly wage under Section 10(c). *See, e.g., National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1293 (9th Cir. 1979); *Palacios*, 633 F.2d at 843. In *Bonner*, the claimant, a pipefitter-helper, was injured after thirteen weeks on the job. *Bonner*, 600 F.2d at 1292. Prior to that, she had worked as a sandblaster, barmaid, and babysitter. *Id.* The ALJ calculated the claimant's average weekly wage without regard to her earlier employment. *Id.* at 1291. The Ninth Circuit affirmed the ALJ's ruling, noting that "the trier can reasonably draw an inference that but for the injury, the worker would have continued to earn the new, higher wages." *Id.* at 1293.

Here, Claimant's actual earnings do not represent his wage-earning capacity at the time of injury. Claimant left a lower-paid position as a plumber with a pool company and was working in a higher paid position at Triton. Claimant fully expected to continue working at Triton for an indefinite period. In other words, but for his injury, Claimant would have continued to be compensated by Triton at a rate of $32.49 an hour. As the *Bonner* court noted, "[i]t is not unusual for a student or apprentice to work at relatively low pay for a period before beginning a job that commands much higher wages." *Id.* When Claimant accepted a position at Triton, he commanded a much higher wage. It is this higher wage that accurately reflects Claimant's *future* earning capacity. Therefore, in applying Section 10(c), only Claimant's wages from Triton must be considered.

In sum, I conclude that the $19,798.78 that Claimant earned for the 15 weeks preceding his industrial injury accurately represents his pre-accident earnings. RX 9, ALJX 3.[3] However, since this calculation should "reasonably represent the annual earning capacity of the injured employee," $19,798.78 must be multiplied by 3.46667 (15 weeks times 3.46667 equals 52.00005), to arrive at a yearly salary of $68,635.84. 33 U.S.C. §910(c); *see Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990). This figure is then divided by 52 pursuant to Section 10(d), which produces an average weekly wage of $1,319.92 and a compensation rate of $879.95. *See Barber v. Tri State Terminals, Inc.*, 3 BRBS 244 (1976).

Section 14(e) Penalties and Interest

Claimant asserts that he is entitled to a penalty pursuant to Section 14(e) based on Employer's failure to pay Claimant benefits or to controvert Claimant's right to benefits after he filed his claim for compensation for his injury.

Failure to begin compensation payments within twenty-eight days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to 10% of the overdue compensation. 33 U.S.C. § 914(e). The first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. § 912(d), or after the employer has knowledge of the injury. 33 U.S.C. § 914(b); *Universal Terminal and Stevedoring Corp. v. Parker*, 587 F.2d 608 (3rd Cir. 1978). The employer then has an additional fourteen days to pay the installment before Section 14(e) penalties are imposed. 33 U.S.C. § 914(e). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. § 914(d); *See also Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984).

[3] This computation is based on Claimant's calculations in ALJX 3. The parties stipulated to the accuracy of these calculations at the hearing. Tr 11.

I find that Employer's compensation payments were timely and Employer is not liable for Section 14(e) penalties. Employer had knowledge of Claimant's injury on December 3, 2001.[4] RX 1. The first installment of compensation became due on December 17, 2001. Employer's first payment to Claimant was on December 19, 2001, two days after it became due. RX 4. Accordingly, Employer's first installment of compensation was paid within fourteen days after it became due. Moreover, in response to the memorandum of informal conference from the Director of the Office of Workers' Compensation Programs, dated August 28, 2002, Employer filed a notice of controversion regarding the computation of Claimant's average weekly wage on September 10, 2002. RX 8. Claimant submitted no evidence and made no argument demonstrating that this controversion was untimely. Thus, Employer is not subject to the Section 14(e) penalty.

Attorney's Fees and Costs

Under Section 28 of the Act, a claimant may recover reasonable and necessary attorney's fees and costs associated with the "successful prosecution" of his claim. 33 U.S.C. § 928. Claimant is entitled to reasonable attorney's fees and costs for the work done on the issues that Claimant has prevailed upon.

CONCLUSION

Claimant's average weekly wage at the time of injury was $1,319.92, giving Claimant a compensation rate of $879.95. Employer is not subject to Section 14(e) penalties. Employer will be subject to the payment of appropriate and reasonable attorney's fees and costs to Claimant's counsel.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, I issue the following order:

1. Triton shall pay Claimant temporary total disability at the compensation rate of $879.95 per week beginning November 28, 2003, and continuing until otherwise ordered.

2. Triton shall pay interest on each unpaid installment of compensation from the date compensation became due. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States

[4] In his Claim for Compensation, Claimant indicated November 24, 2001 as the date of employer notice. However, even assuming this earlier date is accurate, Employer's first installment was paid within fourteen days after it became due. RX 24.

Treasury bills as of the date this Decision and Order is filed with the District Director. See 28 U.S.C. §1961.

3. Triton is entitled to a credit for benefits already paid.

4. All computations are subject to verification by the District Director who in addition shall make all calculations necessary to carry out this Order.

5. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge